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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: DEC 02 2005

EAC 03 116 53229

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) summarily dismissed petitioner's appeal, but subsequently reopened the matter on technical grounds. The AAO will now consider the appeal on its merits. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner was a doctoral student and research scientist at Brown University. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services (CIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the

> "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel states that the petitioner "is a Ph.D. candidate at [redacted] in the field of Cellular Biochemistry. His research focuses on the growth mechanisms that operate in liver cells of the developing fetus in an effort to better understand how cancer cells grow and react to various drugs." Counsel contends that the petitioner "is among America's most significant scientists studying the mechanisms for liver cancer progression and diabetes – more specifically, whether the cause of cancer may be due to a problem in the signaling mechanisms that regulate cell division within the body, and whether differences in enzyme activities [are] responsible for the often severe insulin resistance observed in diabetic patients."

The petitioner submits several witness letters in support of his petition. Most of the witnesses are on the faculty of Brown University and/or its affiliated hospitals. [redacted], the petitioner's supervisor at Brown, states:

> [The petitioner's] areas of expertise, liver cancer biology and the pathogenesis of diabetes, are ones that are pursued by a small number of individuals each year. Yet even among his peers who are performing high-level research in these fields, [the petitioner's] work has been at the very top – of sufficient quality and originality to warrant its publication in outstanding scientific journals.

[redacted] does not offer any further details about the petitioner's work, nor does he offer any evidence of the quality of the petitioner's work except for the observation that the petitioner's work has been published. Prof. [redacted] observes that, as a graduate student with no permanent job offer, the petitioner is ineligible for labor certification, and that it would be against the national interest if the petitioner "were forced to leave academia and work for a private employer in a full time permanent position just so that he will qualify to be sponsored for Labor Certification." Other Brown faculty members offer similar arguments. These individuals fail to take into account the fact that the petitioner's valid F-1 nonimmigrant student visa permits the petitioner to continue his

academic work for as long as he remains a *bona fide* student. Thus, the petitioner's lack of permanent employment does not require the cessation of his ongoing research work.

Three of the eight initial witnesses are not affiliated with [redacted]. Professor [redacted] of the [redacted] states that the petitioner's "novel observations in the area of insulin signaling and rapamycin-resistance could lead to a much more detailed understanding of the pathogenesis of diabetes and cancer cell proliferation." [redacted] states that he is "familiar with [the petitioner's] work based on his publications."

Professor [redacted] of Penn State College of Medicine met the petitioner at a professional conference, where [redacted] "was impressed by the quality of work presented by [the petitioner] and by his range of knowledge and comprehension." [redacted] states that the petitioner's work "could be informative on mechanisms of insulin resistance seen in tissues of patients suffering from Type 2 diabetes, a major cause of disability and death in the USA."

[redacted] of Chiba University in Japan also met the petitioner at a professional conference. Dr. [redacted] states:

> [The petitioner] has been able to show very convincingly that liver proliferation in the fetus is highly resistant to the drug, rapamycin. Rapamycin is now an FDA approved immunosuppressant and a candidate anti-cancer drug. As of today, there is no clear understanding of what rapamycin does or how it acts. The peculiar resistance to rapamycin observed by [the petitioner] could serve as a very important model for the investigation of the mechanism of rapamycin action.

Professor [redacted], a member of the petitioner's doctoral advisory committee, states:

> [The petitioner] has been the lead researcher in landmark studies describing unique growth pathways in the fetal liver. The studies have revealed that fetal hepatic cells in a normal developmental context actually share key biochemical properties with tumor cells. Yet unlike tumor cells, these cells are under stringent control and can revert to another, "normal," set of regulatory pathways after birth. Understanding the details about how these regulatory processes are controlled and their implications is vital to the health concerns of US citizens, particularly with relevance to major diseases of cancer and diabetes.
>
> National and international recognition of the quality and uniqueness of [the petitioner's] research is exemplified in several ways.
>
> 1) [The petitioner's] studies have been published in highly prestigious journals . . . [that] are highly selective and typically reject the majority of manuscripts submitted for publication.
> 2) [The petitioner] has been invited to present his research findings at major national scientific forums including the Experimental Biology 2002 meeting and the Cold Spring Harbor

Conference. . . . Very, very few researchers at this stage of their training are invited to present research in these two forums in a single year.

3) [The petitioner] is a member of two prestigious scientific societies, ASBMB and the AACR. These professional societies require new members to be sponsored by established senior members who can vouch for the applicant's scholarly abilities and contributions to the field.

The record contains copies of two articles co-written by the petitioner, but there is no evidence to establish that these articles have had a particularly significant impact on the petitioner's specialty. For instance, there is no indication that other researchers have heavily cited these two articles.

Letters confirm the petitioner's participation at the two conferences identified above, but the letters are silent as to the total number of participants or the likelihood of acceptance of submissions for presentations. With regard to the petitioner's professional memberships, [redacted], CEO of the [redacted], states:

> [The petitioner] is an Associate Member of the [redacted]. [redacted] is an international professional organization consisting of over 18,000 scientist working in every discipline of laboratory, clinical, and translational cancer research. . . .
>
> Associate Membership is one of seven categories of membership in the [redacted]. Associate membership is open to graduate students. . . . Applicants must be nominated by one current Active, Emeritus or Honorary member in good standing in the [redacted], who can attest to the candidate's achievements, and affirm that his or her research adheres to accepted ethical standards.

[redacted] does not specify what level of "achievements" the candidate must attain to qualify for associate membership.

[redacted], executive officer of the [redacted], states that the beneficiary is an associate member of [redacted], and that "Associate membership is available to individuals sponsored by a Regular member of the Society who can attest to the interest of the candidate in biochemistry and molecular biology."

The petitioner is also a student member of the American Physiological Society. The record indicates that student membership in that society is open to "any student who is actively engaged in physiology work as attested to by two regular members of the Society" and whose studies "should lead to an advanced degree in physiology or [a] related area."

In short, the petitioner has not shown that his memberships, presentations and publications are, as claimed, evidence of that the petitioner enjoys a particularly elevated standing in his field.

The director denied the petition, observing the lack of citations of the petitioner's published work, and the preponderance of Brown University faculty among the petitioner's witnesses. On appeal, counsel argues that the

director should have issued a request for evidence, pursuant to 8 C.F.R. § 103.2(b)(8). That regulation does not require the issuance of such a notice if the record contains *prima facie* evidence of ineligibility, which we shall discuss later in this decision. If there were no evidence of ineligibility, the expedient remedy would be to consider, on appeal, the evidence that the petitioner would have submitted in response to a request for evidence.

Several of the exhibits concern manuscripts written, or presentations made, well after the petition's February 28, 2003 filing date. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the alien becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Therefore, a petitioner may not make material changes to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 175 (Comm. 1998). Evidence of the petitioner's activities subsequent to the filing date cannot retroactively establish the petitioner's eligibility as of the filing date.

With regard to the petitioner's earlier activities, counsel cites documentation "showing that the two articles that [the petitioner] had published prior to the filing date have now been **cited ten times**" (counsel's emphasis), with one article cited eight times, the other twice. The petitioner has not shown that ten citations is an unusually high number for a researcher in his specialty, and even then, counsel fails to acknowledge that half of these ten citations are self-citations by the petitioner and/or his co-authors.

The petitioner submits four new letters on appeal, three of which are from prior witnesses. [redacted] states that the director erroneously deemed him to be one of the petitioner's collaborators, when in fact he and the petitioner "have never collaborated on any work together." The director never claimed otherwise. Rather, the director stated "most" of the letters were from the beneficiary's collaborators or other close associates. The director was correct in this assertion, given that more than half of the witnesses work at the university where the petitioner was studying at the time.

[redacted] asserts "I am one of the most respected scientists in the world in the study of fetal origins of adult disease. The very fact that I contacted [the petitioner] at the time of his publications to discuss his research shows that he had an impact on me." The director did not question [redacted] credentials or the credibility of his letter. It remains, nevertheless, that this letter does not establish the breadth of the petitioner's impact throughout the field, and [redacted] does not claim to speak on behalf of others in the specialty. In his new letter, [redacted] asserts that the petitioner's findings "will receive widespread attention," but the available evidence (including only five independent citations) does not show significant existing impact on the field. Absent such evidence, statements regarding the attention that the petitioner's work "will" receive are necessarily speculative. The petitioner need not establish that he is among the preeminent experts in his specialty, but it cannot suffice simply to show that he has been active and productive in his chosen field.

New letters from [redacted] and [redacted] reiterate the claim that the petitioner is unusually accomplished for his career level. [redacted] states that the petitioner "is simply above the norm and his evidence proves this, but you seem to want something higher than above the norm." Pursuant to section 203(b)(2)(A) of the Act, an alien of exceptional ability in the sciences is typically subject to the job offer requirement; exceptional ability is not *prima facie* grounds for a waiver. 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered in the sciences,

arts, or business." Thus, by statute and regulation, "above the norm" is not, in fact, a sufficient threshold to establish eligibility for the waiver, even if the petitioner had unequivocally shown himself to be "above the norm" as claimed.

The new witness on appeal is [redacted], deputy director of the Office of Drug Evaluation III at the [redacted]. While the letter is in the form of a "memorandum" from the Center for Drug Evaluation and Research, there is no indication that [redacted] is writing on behalf of that body, or is authorized to do so. [redacted] was formerly an assistant professor at [redacted], and states that an adjunct professor at [redacted] asked for her letter. Like other witnesses, [redacted] relies on a speculative assertion: "It can be anticipated that as more time elapses, [the petitioner's] work will be more extensively cited and critiqued."

Review of the record indicates that, while the petitioner's reputation is not entirely confined to [redacted], it is largely so. The petitioner's minimal citation record, coupled with a small number of witness letters attesting to the expected future impact of the petitioner's work, cannot suffice to establish a prior track record sufficient to justify a finding of substantial prospective national benefit that exceeds (as the law requires) the threshold for "exceptional" aliens.

Beyond the decision of the director, review of the record reveals an additional ground of ineligibility. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

Specifically, the record does not establish the petitioner's eligibility for the underlying immigrant visa classification sought. 8 C.F.R. § 204.5(k)(3)(i) states that, to show that the alien is a professional holding an advanced degree, the petition must be accompanied by:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Pursuant to *Katigbak*, the petitioner must show that he qualified for the immigrant visa classification sought (i.e., had an advanced degree or its equivalent) as of the petition's February 28, 2003 filing date.

The director, in the notice of decision, stated that the petitioner "earned his Doctorate in Biology from [redacted] and was awarded the degree in May 2003." The record manifestly does not support this finding, and the petitioner has never claimed that he earned his doctorate in 2003. The director's finding that the petitioner earned his doctorate in 2003 is clearly erroneous and cannot stand.

We must, therefore, turn to what the evidence does establish regarding the petitioner's academic credentials. The petitioner claims to have earned his bachelor's degree in April 1998, less than five years before he filed the petition in February 2003, and therefore it is impossible for the petitioner to have satisfied 8 C.F.R. § 204.5(m)(3)(i)(B) by accumulating at least five years of progressive post-baccalaureate experience as of the filing date.[1] Therefore, in order to qualify as a member of the professions holding an advanced degree, the petitioner must hold an actual advanced degree, and document it in accord with the above-quoted provisions of 8 C.F.R. § 204.5(k)(3)(i)(A).

The initial filing includes a letter, dated February 12, 2003, from [redacted], interim dean of Medicine and Biological Sciences at [redacted]. [redacted] states that the petitioner "has completed all requirements for the MA in Biology degree," and "will be awarded this degree formally in a few months time (May 2003)." A letter from the interim dean is not an "official academic record," which is the required regulatory standard; and even if it was such a record, the regulatory standard requires that "the alien has an United States advanced degree," not that the alien has "met the requirements" for a degree to be awarded at some future time. The petitioner did not submit an official academic record showing that he had an advanced degree at the time of filing, and [redacted] letter indicates that the petitioner did not have that degree until several months after the filing date.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee. Because the petitioner has now earned his advanced degree, eligibility for the underlying classification would not be an issue in a future proceeding.

ORDER: The appeal is dismissed.

[1] The record contains no official documentation of the petitioner's bachelor's degree from Thanjavur Medical College, but because the claimed degree is non-qualifying on its face, the inclusion of such documentation would have been of no benefit to the petitioner.